No. 89-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF COLUMBIA and COLUMBIA OUTDOOR ADVERTISING, INC.,

Petitioners,

v.

OMNI OUTDOOR ADVERTISING, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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Respondent takes the position that the only real issue in this case is the sufficiency of the evidence to support the jury's findings, and then tendentiously discusses the trial record at length. But such an approach cannot explain away the important legal issues raised by the Fourth Circuit's ruling. Omni makes no serious effort to square that ruling with the governing precedents of this Court. It does analyze at some length the decisions from other circuits cited in the petition. But these analyses, designed to indicate the absence of intercircuit conflicts, can charitably be described as unpersuasive.

1. Respondent's detailed, if one-sided, rendition of the evidence presented at trial apparently is intended to persuade this Court that COA and the City entered into a conspiracy not meriting *Parker* or *Noerr-Pennington* pro-

tections. Nothing in that discussion, however, undermines petitioners' position or otherwise counsels against review.

To begin with, of course, what matters now is the decision of the Fourth Circuit, not the trial record. As we have noted, that court relied solely on evidence (1) that COA, using legal means, lobbied for billboard ordinances in order to protect its market position, and (2) that City officials "agreed" to these requests with the same goal in mind, due to personal relationships with owners of a local business. The petition assumed all of these facts,[1] and showed that they are not sufficient to rule out *Parker* immunity for the City and *Noerr-Pennington* immunity for COA. Respondent has not even attempted to demonstrate otherwise.

Omni's effort to stir up the facts, moreover, adds only to the rhetoric, not the analysis of this case. It constantly repeats the same basic proposition—that there was a "corrupt conspiracy" here because COA and the City acted in concert for the subjective purpose of maintaining COA's business position. Despite this penchant for repetition, however, Omni points to nothing that would suggest that COA went beyond wholly legal and conventional lobbying methods in putting forward its point of view, or that it otherwise subverted the municipal legislative process.

The fact that COA sometimes gave free or discounted billboard space to politicians does not detract from this conclusion, despite respondent's assertion that City official and COA had a "secret, illegal and continuous agreement to utilize mutual resources" whereby legislation favoring COA's market position was exchanged for "unfair advertising advantages to incumbent Councilmen." Br. in Opp. at 3. As the Fourth Circuit noted, there was no evidence that billboard space was offered to City officials during the relevant time period. Pet. App. 17a & n.4.[2] More significantly, there is no indication whatever that such donations are illegal or that they became improper in this case because they were linked to an explicit or implicit *quid pro quo*. To the contrary, the donations were identical in nature and effect to campaign contributions, which, as the Ninth Circuit has stated, are a "legal and well-accepted part of our political process." *Boone v. Redevelopment Agency*, 841 F.2d 886, 895 (9th Cir.), *cert. denied*, 109 S. Ct. 489 (1988). Reliance on such a factor would thus put at risk the vast majority of municipalities and their officials when they take any number of actions affecting private interests.

Plainly aware of these considerations, the court of appeals placed no particular emphasis on the donations in reaching its conclusions. Rather, the court treated these contributions as just one of a number of signs that petitioners acted in concert and for COA's benefit. They were no more or less significant, in the court's analysis, than the fact that the owner of COA sometimes had the Mayor of Columbia over for dinner. *See* Pet. App. 13a-18a (summarizing "evidence concerning conspiracy").

In sum, respondent has pointed to nothing in this decision below, or the trial record, that would differentiate this case from any typical legislative fight over economic turf. Invariably, in such circumstances, the losing party can allege an anticompetitive "agreement" between its competitor and the government, if only because that competitor has received the governmental response that it requested. Often, especially at the local level, there are personal relationships and/or campaign contributions that can be cited as evidence that the fight was not a "fair" one or

[1] As the Fourth Circuit indicated, Pet. App. 17a, there was another side to this story presented at trial, but that factual dispute is not relevant here.

[2] The court referred to donations to the Mayor of Columbia a full four years prior to the relevant year and donations to two Council members in the years after the relevant year. Pet. App. 17a. It acknowledged that this last set of donations to Council members "at best had minimal probative effect." *Id.* at 17a n.4.

that the municipality did not act "independently" and for "public" motives.

It follows that the Fourth Circuit's decision to withhold *Parker* and *Noerr-Pennington* immunities based on such facts largely eviscerates those immunities in the local legislative context. It is one thing, as this Court and other circuits have recognized, to withhold protection where a business wins a competitive advantage through bribery, coercion or some other overt corruption of the political process. *See* Pet. 9 n.6, 14-18. It is quite another for the federal courts to begin scrutinizing conventional and legal lobbying activities, or the subjective motives of public officials, to ferret out legislative decisions that reflect undesirable "conspiracies."

2. Respondent's effort to find underlying consistencies between the ruling below and the decisions in other circuits cited by petitioners is likewise without merit. In the *Parker* area, as we have shown, the Ninth Circuit has rejected a conspiracy claim just like Omni's, on facts that are indistinguishable from those presented here. *See Boone v. Redevelopment Agency, supra.* Respondent deals with this case by refusing to discuss it. *See* Br. in Opp. at 16 n.22. Along with *Boone*, three other cases cited by petitioners hold that subjective anticompetitive motivations of government officials cannot justify withholding *Parker* immunity.[3] Omni's answer to these cases is either to ignore the relevant passage, Br. in Opp. at 16-18 (discussing *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985)), or to suggest, quite remarkably, that the issue of subjective motivation—*i.e.*, the reason why the City Council adopted the billboard ordinances—is not raised by the Fourth Circuit's ruling, Br. in Opp. at 19.[4]

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[3] *See Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 234-36 (3d Cir. 1987); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 n.7 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982).

[4] The linchpin of the decision below on the *Parker* issue was a reference to the jury's "implicit . . . finding that the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired *solely to further COA's commercial purposes to the detriment of competition in the billboard industry.*" Pet. App. 9a (emphasis added). *See also* Pet. App. 12a ("What is not permissible in the *Parker* immunity context, however, is that such private contacts and agreements relate not to the purpose of attaining governmental action but solely to forcing competitors from a particular market."

In the *Noerr-Pennington* context, respondent is forced to deal with a line of cases that require a showing of bribery, coercion or some other illegal corruption of the process before successful petitioning of government will be denied protection. Many of these cases specifically reject the notion that an allegation of "conspiracy," without actual corruption, is enough on its own. *See* Pet. 15 nn. 14 & 15. Omni avoids the obvious conflict between these cases and the decision below merely by wishing it away. Like the Fourth Circuit, it reasons that there was a subversion of governmental processes here simply because of evidence that the City acted in order to help COA, and concludes that any lobbying that produced such an outcome must automatically constitute a form of corruption rather than legitimate petitioning of government. *See* Br. in Opp. at 20.

Such an approach, elevating labels over substance in the application of the antitrust laws to political activities, cannot be squared with the majority rule in other circuits. *See* Pet. 15. Indeed, the Fourth Circuit's *Noerr-Pennington* analysis carries the court to a new level of illogic. Under *Noerr*, a private party is allowed to seek governmental action, even if its sole motivation is anticompetitive. According to the Fourth Circuit, however, such a party may be held to have violated the antitrust laws if the relevant government officials agree to the request for the wrong reason—*i.e.*, solely to help the private party. Even assuming that there were a basis for inquiring into the motives of governmental officials in applying the *Parker* doctrine, such an inquiry could not play a role in assessing the liability of private parties

under *Noerr-Pennington* without, for all practical purposes, eliminating the doctrine.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] *See Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1083 (5th Cir. 1988) (rejecting such a rule as too great a burden on first amendment right to petition) ("In such a case, WAX . . . would have to withhold its petition altogether if it determined that the City might act on it for anticompetitive reasons. Otherwise, the submission of the petition alone might subject WAX to antitrust liability if it were ultimately determined that the City acted for the anticompetitive reasons it shared with WAX . . . ."), *cert. denied*, 109 S. Ct. 1955 (1989).